Accordingly as regards costs of this application, the unsuccessful first and second defendants shall pay costs as if the application had been made by summons in chambers.

Order accordingly.

Solicitors:—*Triptipal Singh; Natha Singh & Subbiah; Rodyk & Davidson.*

CHOK KOK THONG v. THE MINISTER FOR HOME AFFAIRS & ORS.

[O.Cr.J. (Winslow J.) May 14, 1963]

[Singapore — Habeas Corpus No. 1 of 1963]

Habeas Corpus—Transfer of applicant to proper place of detention—Application for—Criminal Procedure Code (Cap. 132), ss.375, 383, 386.

Preservation of Public Security Ordinance, 1955, s. 3—Detention under—Validity of Order—Habeas Corpus for transfer to proper place of detention—Whether Court can intervene.

This was an application made under section 375 etc. of the Criminal Procedure Code and sought for a declaration that the solitary confinement of the applicant at the Central Police Station lock-up was improper and without any legal justification whatsoever. The applicant also asked for a writ of *habeas corpus* to be issued directing the proper detaining authorities to forthwith effect his removal to a proper place of detention.

Held: (1) the application was misconceived, because it did not comply with the procedure laid down by section 386 of the Criminal Procedure Code;

(2) as the detention Order was made in accordance with the provisions of section 3 of the Preservation of Public Security Ordinance the detention was lawful and cannot be attacked;

(3) there was no evidence to indicate that the applicant's conditions of detention were improper or oppressive as to require intervention by the Courts on an application under section 375 of the Criminal Procedure Code.

HABEAS CORPUS.

T. T. Rajah for the applicant.

Tan Boon Teik (Senior Crown Counsel) for the respondents.

Winslow J.: This application is made under section 375 etc. of the Criminal Procedure Code and asks for a declaration that the solitary confinement of the applicant, Chok Kok Thong, at the Central Police Station lock-up is improper and without any legal justification whatsoever. The applicant also asks for a Writ of *Habeas Corpus* to be issued directing the proper detaining authorities to forthwith effect his removal to a proper place of detention.

In my opinion this application is misconceived. Any application for the transfer of a prisoner from one custody to another must necessarily comply with the procedure laid down in section 386 of the Criminal Procedure Code. On such an application the High Court would be in a position to exercise its discretion under section 383 of that Code.

Mr. T. T. Rajah, Counsel for the applicant, sought to attack the legality of the detention by stating that the applicant was being illegally and improperly detained. I have carefully considered the complaints of illegal and improper detention made on behalf of the applicant and have come to the conclusion that more than sufficient cause has been shown to the contrary.

I see no merit in the contention, somewhat belatedly made, that the detention order made by the Minister for Home Affairs is bad in law. It was made in accordance with the provisions of section 3 of the Preservation of Public Security Ordinance, 1955 and speaks for itself. On the strength of that order, which has been exhibited, the detention is lawful and cannot be attacked. Nor is there any validity in the contention that the removal orders dated 8th March, 1963 and 4th May, 1963 are illegal, improper and not in accordance with the law.

As to the complaints of ill-treatment accorded to the detainee these have been denied and there is no evidence to indicate that his conditions of detention are improper or oppressive or such as to require intervention by the Courts on an application under section 375 of the Criminal Procedure Code inasmuch as I hold that the applicant is in lawful custody and cannot be considered to be improperly detained. Whether he will succeed on the present materials before the Court in any future application under section 383 is a matter for speculation.

The order *nisi* is accordingly discharged.

Order nisi discharged.

SHAIK ALY SAHIB & ORS. v. M. I. & M. CORPORATION & ANOR.

[O.C.J. (Winslow J.) May 17, 1963]

[Singapore — Suit No. 1093 of 1959]

Trade marks—Infringement and passing off—Deceptive resemblance—Essential feature—Idea of a mark—Injunction—Trade Marks Ordinance (Cap. 185), ss.10, 14.

The plaintiffs for more than 20 years manufactured and sold vegetable oil and ghee for cooking purposes in tins bearing a distinctive label comprising a red flower with green leaves against a yellow background enclosed within a red circle. The trade mark was registered in 1952 in class 29 in respect of vegetable oil and ghee for cooking purposes.

In 1959 the defendants commenced selling vegetable oil and ghee for cooking purposes not of the plaintiffs' manufacture or merchandise in tins of similar proportions and weights with labels containing a representation of a red flower with green leaves against a yellow background.

The plaintiffs' flower was a sun flower which had red petals and a yellowish centre with slight green dashes whereas the defendants' label was a sun flower with red petals. The plaintiffs' tins contained a description in English, Tamil and Malay whereas the defendants description was given only in English. The plaintiffs claim an injunction against the defendants for infringement of their trade mark and for passing off in respect of certain vegetable oil and ghee for cooking purposes.

Held: (1) the defendants' mark is such that although it may disclose a number of points of difference from the plaintiffs' mark such as in the number of leaves and in the size or shape of the flower depicted thereon or in the absence of the enclosing red circle, the idea which would remain with any person seeing them apart at different times might be the same;

(2) the defendants have deliberately imitated the plaintiffs' mark, albeit by retaining the sun flower depiction by adopting the hues which are the distinguishing characteristics of the plaintiffs' mark;

(3) in all the circumstances, the plaintiffs' mark deserves the court's protection in the interests of honest trading and general commercial morality and the plaintiffs' claim for an injunction should succeed.

Cases referred to:—

(1) *Taw Manufacturing Co. Ltd.* v. *Notek Eng Co. Ltd. & Anor.* (1951) 68 R.P.C. at p. 273.

(2) *Payton & Co. Ltd.* v. *Snelling, Lampard & Co. Ltd.* (1900) 17 R.P.C. 48, 57, C.A.

(3) *Johnston* v. *Orr-Ewing* (1882) 7 App. Cas. 219.

(4) *Asia Organisation Ltd.* v. *White Hudson & Co. Ltd.* [1962] M.L.J. 139.

(5) *Dunhill* v. *Bartlett & Bickley* (1922) 39 R.P.C. 426, 438.

(6) *M. Saper Ltd.* v. *Specter's Ltd. & Boxes Ltd.* (1953) 70 R.P.C. 173, 178.

ACTION.

E. W. Barker for the plaintiff.

A. Muthuswamy for the defendants.

Cur. Adv. Vult.

Winslow J.: In this action the plaintiffs claim an injunction against the defendants for infringement of a trade mark and for passing-off in respect of certain vegetable oil and ghee for cooking purposes. The first defendants are said to be a firm carrying on business at No. 48 Market Street, Singapore, as manufacturers of vegetable oil and ghee while the second defendants are said to be a firm carrying on business at No. 25-D Java Road, Singapore, as distributors and dealers in vegetable oil and ghee.

It is claimed by the plaintiffs that for upwards of 20 years they have manufactured or sold vegetable oil and ghee for cooking purposes in tins bearing a distinctive label substantially in the form of a trade mark No. 15336 which was registered by the plaintiffs' predecessor in title on the 14th June, 1952, in Class 29 in respect of vegetable oil and ghee for cooking purposes. The plaintiffs are now the registered proprietors thereof. The said trade mark comprises a red flower with green leaves against a yellow background enclosed within a red circle.

In 1959 the defendants commenced selling vegetable oil and ghee for cooking purposes not of the plaintiffs' manufacture or merchandise in tins of similar proportions and weights with labels containing a representation of a red flower with green leaves against a yellow background.

The plaintiffs contend that the defendants' label or marking, by reason of colourable resemblance to that of the plaintiffs, is calculated to represent or lead to the belief that such oil or ghee is the oil or ghee of the plaintiffs thus enabling them to pass-off their own vegetable oil or ghee as that of the plaintiffs' manufacture. They further contend that the said label of the defendants was designed and adopted with the object of enabling the said label of the defendants to be mistaken for and confused with the plaintiffs' label.

The plaintiffs' trade mark as registered is a coloured trade mark in three specified colours, namely, red, green and yellow which fact should be taken into consideration in deciding on the distinctive character of such trade mark as provided by section 14 of the Trade Marks Ordinance, Chapter 185.

It is a well-known proposition at law that a trade mark is infringed if a person other than the proprietor uses in relation to goods covered by the registration one or more of the trade mark's essential particulars and that the identification of an essential feature depends partly upon the Court's own judgment and partly upon the burden of the evidence. (*Taw Manufacturing Co., Ltd.* v. *Notek Eng Co., Ltd. and Another*[1]). Section 10 of the Trade Marks Ordinance provides that a trade mark registrable in Part A of the Register must contain at least one of a number of essential particulars set out therein. The only essential particular that can apply in the present case is set out in paragraph (e) of subsection (1) thereof as "any other distinctive mark". According to subsection (2), "distinctive" means adapted, in relation to the goods covered by the registered trade mark, to distinguish goods with which the proprietor is connected in the course of trade from goods in the case of which no such connection exists. Subsection (3) provides that in determining whether a trade mark is adapted to distinguish as aforesaid the court may have regard to the extent to which—

(a) the trade mark is inherently adapted to distinguish as aforesaid; and

(b) by reason of the use of the trade mark

or of any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid.

It was claimed on behalf of the plaintiffs that the essential features of their trade mark as registered consisted of a red flower with green leaves and a yellow background. I find that these were distinctive marks contained in the trade mark within the meaning of section 10 which were not only inherently adapted to distinguish the plaintiffs' ghee from that of others but by reason of the use of the trade mark in its distinctive colours the trade mark was in fact adapted to distinguish as aforesaid.

On the evidence adduced I accepted the following facts as proved:—

(a) That the plaintiffs or, at least, the deceased, of whose estate they were co-administrators, had used labels containing a representation in the three distinctive colours of the registered trade mark from at least as far back as 1948, if not 1941, although the trade mark was only registered in 1952 as such. The defendants on the other hand only commenced using their representation comprising a red flower with green leaves against a yellow background in 1959.

(b) The first defendant although shown on the labels as a manufacturer of the ghee sold by the second defendant merely lent the colour of his name and reputation to labels affixed to the tins containing the ghee actually manufactured and sold by the second defendant. He had promised to finance the second defendants' enterprise but his name ceased to appear on such goods after August, 1959 consequent on protest by the plaintiffs. However it is significant that he rented his store in Johore Bahru to the second defendant and has, to this date, allowed the latter to use and advertise the former's business telephone number in connection with the latter's ghee business. In these circumstances I am not satisfied that he has entirely severed connections with the second defendant.

(c) The second defendant and his witness D.W.3, K.M. Ramasamy Chettiar, abruptly left the employment of one A.K. Muthan Chettiar in May 1959 after which they commenced a new business known as Sri Renga Vilas & Co. with the second defendant as proprietor. They had been joint employees of Muthan Chettiar from about 1953. The second defendant claimed that the delineation of a sun flower with leaves belonged to D.W.3, Ramasamy Chettiar, and that Ramasamy Chettiar had allowed Muthan Chettiar to use this mark on ghee sold by Muthan Chettiar. That mark, however, had appeared in black print or black with blue print against a background which was sometimes yellow, sometimes blue. Such representations had, however, never been printed in the three distinctive colours registered by the plaintiffs until 1959.

(d) Whilst I was prepared to accept as a fact that the second defendant had been permitted to use the mark said to be owned by D.W.3, Ramasamy Chettiar, I did not consider that such permission empowered him to use that mark in the three distinctive colours registered by the plaintiffs so as to arouse the defence provided by section 48 of the Trade Marks Ordinance. If the present label of the defendants had shown the same mark in the colours used previous to 1959 by Ramasamy Chettiar this defence could possibly have merited consideration.

(e) Although the second defendant tried to put the blame for the choice of colours on the printer, D.W.8 (who was the same person who printed the plaintiffs' labels) as being the person who had suggested that he should print his mark in the three distinctive colours of the plaintiffs this was denied by the printer who said that he offered the second defendant a choice of a red sun flower and green leaves against a background of either green, yellow or white and that it was the second defendant who said that he preferred a yellow background. D.W.3, Ramasamy Chettiar, also in his evidence said that it was the second defendant who suggested a change from black lettering, black leaves and black flower to the present three colours in 1959. The change to the colouring adopted by the plaintiffs was therefore deliberate.

(f) The flower known as the sun flower has a brownish centre and yellow petals. Counsel for the defendants displayed one in a vase in Court. The sun flower on the the defendants' labels has red petals. A careful comparison of the colour scheme adopted by the defendants reveals the fact that they were imitating the distribution of colours on the plaintiffs' label and on the flower and leaves as closely as possible in order to mislead the public into thinking that it was dealing with the plaintiffs' goods.

(g) The majority of the purchasers of this kind of ghee are non-English speaking Tamils. It is significant that whereas the plaintiffs' tins contain a description in English, Tamil and Malay the defendants' description is given only in English. It is difficult to avoid the inference that any description in Tamil or Malay would have given the game away to those Tamils or Malays who knew no English but might know Tamil or Malay.

(h) Most of the witnesses as to deceptive resemblance were actual traders who, as was only to be expected, were not easily deceived. They were strongly partisan depending on whether they were dealers purchasing from the plaintiffs or the defendants. There was evidence, however, that some customers were at first deceived who subsequently discovered that they had in fact obtained the wrong ghee. The deception may have been caused by the dealers themselves—which of course does not carry the case very much further. One witness P.W.5, Shaik Hussein, who is a stall holder at Joo Chiat Market said he placed an order for "Poo Chop Ghee" (i.e. the plaintiffs' flower brand ghee) but obtained delivery eventually of the defendants' ghee. He knew he had obtained a different kind of ghee but he sold it to P.W.6, Ahmad bin Kader Pitchay, who had never used either type of ghee before. As a consequence P.W.6, a cook, was soundly berated by his employer as the ghee turned out to be unsatisfactory. He continued thereafter to purchase the plaintiffs' brand of ghee from P.W.5, Shaik Hussein, for four years. He said he could distinguish between marks of the defendants and the plaintiffs after looking at them closely but it is significant that when he was asked in Court to point out the ghee that he patronised he pointed to the sun flower brand of the defendants. This witness appeared to be typical of the average customer and he was deceived in the sight of the court after comparing two heaps of tins, one heap consisting of the plaintiffs' tins whilst the other consisted of a heap of the defendants' tins of similar weights and sizes to those of the plaintiffs.

The issue therefore is whether the plaintiffs have discharged the onus of proving a reasonable probability of deception of the customer "who knows the distinguishing characteristics of the plaintiffs' goods." (Romer L.J. in *Payton & Co., Ltd.* v. *Snelling, Lampard & Co., Ltd.*[2]).

As *Kerly* says in his 8th Edition on the Law of Trade Marks at page 405—

"When the question arises whether a mark applied for bears such resemblance to another mark as to be likely to deceive, it should be determined by considering what is the leading characteristic of each. The one might contain many, even most, of the same elements as the other, and yet the leading, or it may be the only, impression left on the mind might be very different. On the other hand, a critical comparison of two marks might disclose numerous points of difference, and yet the idea which would remain with any person seeing them apart at different times might be the same".

In *Johnston* v. *Orr-Ewing*[3] an injunction was granted in circumstances where marks consisting of tickets bearing pictures of two elephants with a banner between them, the figures being differently arranged, though unlikely to be mistaken, one for the other, were held to be such that "it might easily happen that they might both be taken by natives of Aden or of India, unable to read and understand the English language, as equally symbolical of the plaintiffs' goods."

In the present case I find that the defendants' mark is such that, although it may disclose a number of points of difference from the plaintiffs' mark such as in the number of leaves and in the size or shape of the flower depicted thereon or in the absence of the enclosing red circle, the idea which would remain with any person seeing them apart at different times might be the same.

The "idea of the mark" of the plaintiff is a red flower with green leaves against a yellow background. This is the same idea with which one is left after viewing the defendants' mark. Having regard to the history of the defendants' adaptation of D.W.3's representation of an entirely different-coloured sun flower with leaves after both the second defendant and D.W.3 had abruptly severed connection with their former employer in 1959, to its present representation of a red sun flower with green leaves against a yellow background it is difficult to say that their present mark is substantially different from that of the plaintiffs. I would go further to hold that they have deliberately imitated the plaintiffs' mark, albeit retaining the former sun flower depiction said to have been originated by D.W.3, by adopting the hues which are the distinguishing characteristics of the plaintiffs' mark.

I have borne in mind the principles of law laid down by our own Court of Appeal in *Asia Organisation Ltd.* v. *White Hudson & Co., Ltd.*[4] (the Hacks/Pecto sweets case) and I do not think I have departed from such tests as may have therein been laid down with regard to deceptive resemblance. As Ambrose J., citing from *Dunhill* v. *Bartlett & Bickley*[5] 438, said—

"Apart from monopolies conferred by patents, and apart from protection afforded by registration, it is open to anyone to adopt the ideas or devices of his neighbour ....provided he clearly distinguishes his goods from that of his neighbour."

In this case the plaintiffs' mark is protected by registration.

The plaintiffs' flower has been variously described as a rose, a "bungaraja", a peony and a nondescript flower trading under the general description of "bunga".

The defendants' flower purports to be a sun flower. It is doubtful how many customers would readily recognise it as such. It is even more doubtful how many would have the experience of florists or botanists to be able to identify a flower possessing the qualities depicted as a sun flower on seeing that its petals are red and that its centre is yellow with very slight red and green dashes and dots. The plaintiffs' flower has red petals and a yellowish centre with slight green dashes.

Seeing the marks as wholes one is driven to the conclusion that the plaintiffs' registered mark deserves the Court's protection, "in the interests of honest trading and general commercial morality" (Harman J. in *M. Saper Ltd.* v. *Specter's Ltd. and Boxes Ltd.*[6]).

As *Kerly* says at page 409

"the tribunal ought not merely to look at the marks as they stand side by side, for, from the nature of the case, they would not be so put before any customer whom it is sought to deceive by means of either of them. He can only contrast the mark upon the goods offered to him with his recollection of the mark used upon those he is seeking to buy, and allowance must be made for this in estimating the probability of deception. Any other rule would be of no practical use."

It must further be borne in mind that the ordinary purchaser has only an ordinary memory and the Court must be careful to make due allowances for imperfect recollection.

In all the circumstances therefore I am satisfied that the plaintiffs' claim for an injunction should succeed and judgment will therefore be entered for them with costs. I also order that the offending labels, prints or wrappers be delivered up to the plaintiffs for destruction. I am prepared to consider submissions on the question of damages.

Judgment for the plaintiff.

Solicitors:—*Lee & Lee; Muthu & Co.*

SAN SEONG CHOY & ORS. v. YUSON BIEN

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) May 20, 1963]

[K.L. — F.M. Civil Appeal No. 63 of 1962]

Evidence—Road collision—Vehicles travelling in opposite directions—Conflicting evidence—Guide by which evidence can be tested.

Damages—Personal injuries—Fracture of right femur, and humerus, left wrist, and radius and ulna of left forearm—Permanent disablement—Assessment of special and general damages.